

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES TERRY III,

Petitioner,

ORDER

v.

08-cv-496-bbc

PETER HUIBREGTSE, Warden,
Wisconsin Secure Program Facility,

Respondent.

On August 29, 2008, I entered an order dismissing James Terry III's habeas corpus petition on the ground that it was a second or successive petition for which petitioner had not obtained authorization from the court of appeals to file, as required by 28 U.S.C. § 2244(b)(3)(A). Petitioner has now filed a notice of appeal and request for a certificate of appealability from that order.

To issue a certificate, the court must find that the applicant has "made a substantial showing of the denial of a constitutional right." Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000); see also 28 U.S.C. § 2253(c)(2). When as here, the court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate should issue when the prisoner shows, at least, "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district

court was correct in its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). There is no dispute that this is petitioner’s second petition challenging his September 4, 2001 conviction and that he did not obtain authorization from the court of appeals before filing it. Indeed, petitioner does not attempt to argue that this court erred in dismissing his petition. Accordingly, because it is not debatable that this court made the correct procedural ruling when it dismissed the petition pursuant to 28 U.S.C. § 2244(b)(3)(A), petitioner’s request for a certificate of appealability must be denied.

Because petitioner has not paid the appellate filing fee and was found indigent for the purposes of filing his habeas petition, I presume that petitioner seeks leave to appeal in forma pauperis. That request will be denied because I find that his appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3). No reasonable person could suppose there is any merit to an appeal when petitioner does not dispute the facts or contend that the court erred in its decision.

I note from the nature of petitioner’s submissions that it appears that his intent in filing this appeal is not to challenge this court’s determination that his petition is successive, but rather to obtain the required appellate court authorization under 28 U.S.C. § 2244(b)(3)(A). If that is the case, then petitioner need not follow the appeals process. Instead, he may file a motion directly in the court of appeals seeking leave to file his successive petition.

ORDER

IT IS ORDERED that petitioner James Terry III's request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the defendant may request a circuit judge to issue the certificate.

Further, IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is DENIED because I am certifying that his appeal is not taken in good faith.

Entered this 17th day of September, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge